DNR-79-015-AK

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Sherburne County Mississippi and Rum Scenic and Recreational River Ordinance.	FINDINGS OF FACT CONCLUSIONS OF LAW and RECOMMENDATION

Tne above-entitled matter came on for hearing before Allan W. Klein on April 9, 1979 at the Elk River Public Library, Elk River, Minnesota.

Appearing on behalf of the Department of Natural Resources (hereinafter the "Department") was A. W. Clapp, III, Special Assistant Attorney General. Appearing on behalf of the Board of Commissioners of Sherburne County (hereinafter the "County") was John E. MacGibbon, County Attorney.

The hearing lasted only two hours, with one witness testifying for each party. Testifying for the Department was Dale Homuth, Regional Hydrologist for the Department. Testifying for the County was Bryan Benson, County Sanitarian. No member of the public (there were about 20 persons present) testified. Because of the unexpected illness of the County Zoning Administrator, it was agreed between the parties that the record would remain open for the filing of additional testimony and briefs for a period not to exceed 36 days. Daring this period, the Minnesota Supreme Court filed its decision in a related case, and the briefing period was extended by the Examiner to permit both parties to present written argument in response to that case. The final material was received an May 31, 1979.

Based upon the testimony and all the evidence in the record, the Examiner hereby makes the following:

FINDINGS OF FACT

Background and Statutory Authority

1. In 1973, the Legislature passed the Minnesota Wild and Scenic Rivers Act which is now codified as Minn. Stat. sec. 104.31 to 104.40 (1978). the Act's purpose can be understood by section 104.32 which reads:

> Tne legislature finds that certain of Minnesota's rivers and their adjacent lands possess outstanding scenic, recreational, natural, historical, scientific and similar values. Because it is in the interest of present and future generations to retain these values, it is hereby declared to be a policy of Minnesota and an authorized putlic purpose to preserve and protect these rivers.

2. In furtherance of the purpose set forth above, the Act provides for the designation and classification of rivers, or segments of rivers, into three classifications:

Wild
Scenic
Recreational

The responsibility for designation and classification is vested in the Commissioner of Natural Resources. Pursuant to this authority, the Commissioner

has designated portions of both the Mississippi River and the Rum River in Sherburne County as either scenic or recreational.

3. The Act provides that the Commissioner shall promulgate statewide minimum standards and criteria for 'the preservation and protection" of designated rivers. These standards were adopted in 1974 and are contained in 6 MCAR secs. 1.0078-1.0081.

4. The Act further provides that for each river proposed for designation and classification, the Commissioner shall prepare a management plan 'to preserve and enhance the values that cause the river to be proposed for inclusion in the system." Before such a plan may be finally adopted, it must be subjected to a public hearing to be held in the county seat of each county which contains a portion of a designated river. Pursuant to this authority, the Commissioner adopted a management plan for portions of the Mississippi River in Sherburne County in September of 1976. This plan is contained in 6 MCAR secs. 1.2400 - 1.2420. In addition, the Commissioner adopted a management plan for portions of the Rum River in Sherburne County in March of 1978. This plan is contained in 6 MCAR secs. 1.2700-1.2720.

5. The Act also provides that all state, local and special units of government shall exercise their powers to further the purposes of the Act and management plans adopted pursuant to the Act, and that if any other law conflicts with the Act, "the more protective provision' shall apply.

6. It should be noted that the rules themselves direct the county to take certain actions. With respect to the Mississippi, 6 MCAR sec. 1.2420 C.3. directs Sherburne County to:

> . . . enact or amend such ordinances and maps as necessary to:
>
> a. Establish Scenic and Recreational River Land Use Districts /for the areas designated in the rule7
>
> b. Conform to the provisions of /Minn. Rule 6 MCAR secs. 1.0078-1.00817.

With respect to the Rum, 6 MCAR sec. 1.2720 D.2. says essentially the same thing, except that in Sherburne County, the Rum is designated as scenic only.

7. The Act also specifically directs local governments with jurisdiction over any area designated as wild, scenic or recreational to do the following:

> Within six months after establishment . . . each local government . . . shall adopt or amend its local ordinances and land use district maps to the extent necessary to comply with the standards and criteria of the commissioner and the management plan.

8. Sherburne County did adopt, on March 20, 1979, an ordinance en-

titled: "Mississippi and Rim Scenic and Recreational River Ordinance'.

9. The Department alleges that this Ordinance does not meet the standards of the statute set forth immediately above. In such a case, the statute provides:

> If a local government fails to adopt adequate ordinances, maps, or amendments thereto within six months, the commissioner shall adopt such ordinances, maps or amendments in the manner and with the effect specified in sections 105.485, subdivisions 4 and 5.

Thisis the method which the Commissioner is following in the case of the Sherburne County Ordinance. Therefore, reference to the cited statute is appropriate.

10. The cited statute is part of a separate but related act which deals with regulation of shoreland development. This Act sets up a regulatory scheme for shoreland abutting all lakes and rivers in the state which are "public waters," and follows essentially the same procedural method as the wild and scenic rivers act in that it directs the Commissioner to promulgate statewide model standards and criteria and then directs counties and municipalities to adopt conforming ordinances. If a county fails to adopt such an ordinance, or if it adopts one which fails to meet the minimum standards, then the Act directs the Commissioner to adapt his model ordinance to the county. It is this part of the Act which is cited

in the Wild and Scenic Rivers Act and which gives rise to this hearing. It reads, in pertinent part, as follows:

> If a county fails to adopt a shoreland conservation ordinance . . . or if the commissioner of natural resources . . . after notice and hearing . . . finds that a county has adopted a shoreland conservation ordinance which fails to meet the minimum standards. . . the commissioner shall adapt the model ordinance to the county. The commissioner shall hold at least one public hearing on the proposed ordinance . . . (Emphasis added)

Therefore, it is necessary to read both the Wild and Scenic Rivers Act and the above-quoted statute together in order to understand the nature of the hearing held in Elk River on April 9. The purpose of the hearing was to determine whether the Sherburne County Ordinance is 'adequate'; whether it "complies with the standards of the Commissioner and the management plan(s)." It is the first step in the process of bringing an allegedly deficient ordinance into compliance with the minimum criteria and management plans. 'Me second step (should the Department be upheld in this first stage) will be the proposing of a new ordinance which must be subject of at least one

public hearing to be held sometime in the future. However, the sole purpose of the April 9th hearing was to measure the March 20th Sherburne County Ordinance against the minimum criteria and mangement plans and determine the degree of compliance.

11. The hearing was held pursuant to an Order for and Notice of Hearing dated March 26, 1979. Although this was short notice, both parties agreed to the April 9th hearing date.

Differences between the Management Plan and the Ordinance

12. The area of land subject to regulation under the Ordinance is substantially smaller than the area of land set forth in the Mississippi River Management Plan. This area, known as the "Land Use District" would be approximately 4825 acres under the Management Plan, but only 1318 acres under the ordinance.

The difference between the two areas arises from the method used to determine them. Under the Management Plan, the District extends landward from the ordinary high-water mark of the river for an average of 1305 feet, but the boundary of the District follows a "zig-zag" path. The Ordinance

on the other hand, creates a District of 450 feet from the river in the scenic portion and 300 feet in the recreational portion. The overall acreage is one difference between the two.

A second difference between the two is the nature of the outer boundary line of the District. The Plan's line follows roads, property lines, and section lines, resulting in a "zig-zag" line. The Ordinance's line is parallel to the River so that it is straight where the river is straight, and curving where the river curves.

The statewide minimum criteria of Minn. Rule 6 MCAR sec. 1.0078 G.2.bb. speaks of a District which would include no more than 320 acres per river mile on both sides of the river. It is silent with respect to the contours of the outer boundary line.

It is found, based upon the substantial differences in acreage and distance from the river, that the Ordinance does not comply with the Plan. See the section entitled "Discussion" for further analysis of this matter.

13. The second major difference between the Plan and the Ordinance is in the size of lots. The Plan specifies (in 6 MCAR sec. 1.2420 B.2.a.) that the statewide minimum criteria shall be applied. The criteria provide, in 6 MCAR sec. 1.0079 C.2., that lots shall be at least four acres in scenic areas and two acres in recreational areas. The Ordinance, on the other hand, provides that lots must be at least two acres in scenic areas, and one acre in recreational areas.

It is found that lot sizes in the Ordinance do not comply with those in either the minimum criteria or the Plan.

14. Ile third major difference between the Ordinance and the Plan arises over lot widths. The minimum criteria require that lot widths at the building line and at the waterline be at least 250 feet in scenic areas, and 200 feet in recreational areas. The Plan, at 6 MCAR sec. 1.2420 B.2.a, adopts the criteria. The Ordinance's required widths are 200 feet in scenic areas and 150 feet in recreational areas.

Again, it is found that the Ordinance does not comply with the Plan.

15. Another difference between the criteria and the Ordinance is in setback from the bluff line. The criteria require at least a 30-foot set back in scenic areas, and a 20-foot setback in recreational areas. The Ordinance compromises the two, requiring a 25-foot setback in both. Thus, the Ordinance is less restrictive than the criteria in scenic areas but more restrictive than the criteria in recreational areas.

The Examiner would note at the outset that the criteria are minimum criteria and the-.'' specifically provide that, in the event that a local ordinance conflicts with them, "the more protective provision shall apply." See 6 MCAR sec. 1.0078 C.5. Thus, there is no reason why a local ordin-

ance could not be more protective than the criteria or a Management Plan.
However, the statutory and regulatory scheme is designed to insure that the statewide minimums will be applied unless particular attributes of an
area mandate a less protective approach and that approach has been adopted in the Management Plan. The Ordinance is found to vary from the Plan.

16. Another difference between the Plan and the Ordinance, although
not as clearly evident as the ones discussed above, relates to permitted

uses in an unspecified Special Use District contained in the Ordinance. The criteria, at 6 MCAR sec. 1.0079 B.2., contain a table of permitted and conditional uses within the Land Use Districts. After listing 19 specific uses, the criteria state:

> All uses not listed as permitted or conditional uses shall not be allowed within the applicable land use district.

The Ordinance, at Section 602.01, contains a similar table. It contains 20 items, with the additional one being "churches and graveyards." it also contains the blanket prohibition quoted above. However, following the table in Section 602.02, the Ordinance adds 13 additional permitted uses for the Mississippi River Special Use District. These include such items as restaurants, professional offices, franchised automobile and implement dealers, service stations, car washes, and other commercial operations, as well as churches.

At the hearing, Bryan Benson, the County Sanitarian, explained that there is an existing cluster of commercial development in the Sherburne County side of the S.A.H. 25 bridge across the Mississippi at Monticello. The intention of the Ordinance was to include only those specific properties in this type of use. Although the dimensions of this Special Use district were not specified in the Ordinance, Benson stated that the boundaries of this district would be drawn into the County Zoning Map or that the area could be delineated in the Ordinance itself.

This is a minor matter if it is treated as Benson proposed. The pre-existing uses can be either dealt with in the Zoning Map or in the Ordinance, itself, and there should be no problem so long as it is made clear that this Special Use District is solely for the pre-existing uses in this one locale. It does not render the Ordinance inadequate so long as the area is specified as proposed by Bryan. The addition of "churches and graveyards" is also insubstantial.

17. There is a difference between the Mississippi Management Plan

and the Rum River Management Plan with respect to the maximum height of agricultural buildings. The criteria, in 6 MCAR sec. 1.0079 C.3.d. provide that the height of any structure shall not exceed 35 feet. There are no exceptions in the criteria. The Mississippi Plan, in 6 MCAR sec. 1.2420 B.2.a., adopts the 35-foot limit with no exceptions. The Rum Plan, however, at 6 MCAR sec. 1.2720 A.4.f., states that the Maximum building height restriction "shall not apply to buildings used primarily for agricultural purposes." The County Ordinance, at Section 502.01, contains the 35-foot limitation but states that it shall not apply to structures "used for agricultural purposes." Thus, the exception would apply to both the Mississippi and the Rum.

At the hearing, Benson stated that most of the County Board members felt that agriculture was extremely important to the County. Although there were few agricultural buildings along the Mississippi River, the Board believed they ought to be allowed to go to whatever height was needed for agricultural use on both the Mississippi and Rum Rivers.

As will be explained more fully below, it appears that the exception for agricultural buildings in the Rum River Plan was made because of local problems which would be created if the criteria were not modified at the time of the adoption of the Plan. That is the reason for having separate plans for each river - so that local attributes can be accommodated. The Mississippi plan, however, contains no such exception. It would be unreasonable to say that the inclusion of the exception in the Ordinance rendered the Ordinance inadequate, but the question of whether or not there ought to be an exception is one which should have been argued and answered at the time that the Mississippi Plan was adopted, rather than at the present juncture.

18. The next difference is one of procedure. The criteria, at 6 MCAR sec. 1.0079 F.3. deal with planned cluster developments. They state that local ordinances shall allow planned cluster developments and that such developments may contain smaller lots than those otherwise permitted if preliminary plans for the development are "approved" by the Commission prior to enactment by the local authority. The Plan, at 6 MCAR sec. 1.2420 B.2.a. adopts this provision of the criteria. The Ordinance, however, allows smaller lots if the preliminary plans are "reviewed" by the Canmissioner prior to enactment.

The difference between "approval" by the Commissioner and "review" by him is a major difference in that it removes the Commissioner's veto power granted in the criteria. It does render the Ordinance inadequate.

19. The criteria, at 6 MCAR sec. 1.0079 I., set forth a complex procedure with respect to utility crossings of rivers. They provide that conditional use permits shall be required for transmission line crossings and they establish standards for such permitted crossings. These requirements are adopted in the Plan at 6 MCAR sec. 1.2420 B.2.a. The Ordinance, at Section 803.01, merely provides that transmission crossings shall comply with the County Zoning Ordinance. At the hearing, Dale Holmuth testified that the Zoning Ordinance does not require conditional use permits, nor does it contain the kinds of standards set forth in the criteria. Bryan Benson testified that the County Board had overlooked this difference and that he did not feel it was a point of disagreement between the County and the Department.

The omission of these requirements is found to be a substantial difference between the Plan and the Ordinance.

20. A similar problem exists with respect to road crossings within the District. The Criteria, at 6 MCAR sec. 1.0079 J., require a conditional use permit for public roads within the district and also set forth standards for such roads. This is adopted by the Plan at 6 MCAR sec. 1.2420 B.2.a. The Ordinance, at Section 602.01(19) indicates that Public Roads are conditional uses "subject to the provisions of Section 8." Section 802.01 requires that a permit be obtained from the Zoning Administrator for "grading and filling work," and sets forth certain standards, but they are not the sane standards as those set forth in the Criteria.

At the hearing, Bryan Benson stated that under the County's proposed District and lot sizes, it was not thought that there would be many roads

inside the District, and so the issue of the standards for road crossings was not discussed at the time of the Ordinance's adoption. He stated, however, that he did not foresee any problems between the County and the Department "coming up with regulations" to cover such crossings.

It is found that if the County's Districts and lot sizes are rejected by the Commissioner, then the absence of standards is an inadequacy in the ordinance. However, should the Districts and lot sizes now in the Ordinance be accepted by the Commissioner, then the absence of standards does not render the Ordinance inadequate.

21. The Criteria, at 6 MCAR sec. 1.0079 C.3.c.l. state that structures shall not be located on slopes greater than 13% unless such structures can be screened and adequate sewage disposal facilities can be installed. The Mississippi Plan adopts this limitation in 6 MCAR sec. 1.2420 B.2.a. The Rum River plan deviates from the criteria. In 6 MCAR sec. 1.2720 A.4.a., a different standard is required (which is too lengthy for repetition here) "because of the erosive nature of soils along much of the Rum."* The County Ordinance, in Section 502.02 repeats the provisions of the Criteria but makes no mention of the different standards for the Rum. It is believed that this was an oversight but it is one which does render the Ordinance inadequate. Where the Criteria have been modified due to particular local attributes, the Ordinance should include those modifications.

22. A different, but related provision of the Rum Plan also appears to have been overlooked. It is 6 MCAR sec. 1.2720 A.4.c., which deals with septic tanks and soil absorption systems. It should be treated in the same manner as the slope variation noted immediately above. The Ordinance is found to be inadequate without it.

Discussion

The County has submitted evidence and argument which, taken generally, is designed to support a position that where the County's Ordinance is less restrictive than the Criteria or the Plan, the Ordinance still fulfills the general policy of the Act ("preserve and protect" the rivers) and, in addition, fulfills other social policies which the Board felt were worthy of attention.

For example, in connection with the Land Use District, the County argued that the zig-zag line in the Management Plan was arbitrary and capricious and that:

> the natural environs of the river including foliage, bluffs, valleys and other objects of natural or scenic interest exist totally independent of lines demarking ownership of private property.

The County also argued that the Plan's zig-zag lines made enforcement more

difficult than its curved line because the zig-zag lines might not always

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*This is another example of a variance between the Criteria and a Plan in order to take into account specific attributes of a particular locale.

be demarcated by a fence or other easily observable boundary, whereas the curved line can be determined "by a simple measurement" from the river.

With respect to lot area, the County argued in support of its smaller lots by asserting that smaller lots would enable persons of more modest income to acquire river lots, that four acres was a waste of natural resources (the County felt that one acre was all that most people needed) . The County also argued that the important area of concern was between the building site and the river and thus regulating the acreage behind the building site did not further the purposes of the Act.

With respect to lot width, the County argued that its own experience with shoreland management had demonstrated the adequacy of a 100-foot width requirement and that additional width "serves no practical purpose and is, in effect, a waste of land." The County viewed its 150-foot width for recreational areas as an attempt at compromise between the 200 feet required in the Criteria and the 100 feet it felt was adequate.

overlaying all of the County's specific arguments was another argument: that the requirements of the Plan were rendered less meaningful because of the substantial areas which were exempt from the Plan's restrictions because they were within municipal boundaries. Having a substantial amount of exempted river frontage diminished the impact of the Plan upon a canoeist, boater, or other person concerned about the preservation of the river.

Virtually all of the County's arguments would be very appropriate if it were the Criteria, or the Plan, which was the subject of the hearing. However, as the Examiner sought to point out prior to, during, and after the hearing, this proceeding is not an appropriate vehicle for an attack upon the wisdom or reasonableness of the Criteria or the Plan. Those matters are past history. They both were the subject of earlier public hearings and are now embodied in legislative rules which have the force and effect of law. The issue to be determined in this proceeding is not whether tour acres is too large a lot size. The issue is a much narrower one - is two acres in compliance with the Criteria and the Plan. Had the Ordinance specified 3.9 acres rather than four acres, then the arguments put forward by the County would be weighed against the arguments put forward by the Department, and the issue would be joined and decided on a standard of reasonableness. However, when the differences are as great as they are with respect to the size of the land use district, lot size, and lot width, then the threshold question of compliance is not met and the reasonableness arguments are inappropriate.

Recent Supreme Court Case

On May 11, 1979, the Minnesota Supreme Court filed its opinion in the case of County of Pine and Scanlon, et al, v. State Department of Natural Resources, et al (No. 178). The case is instructive with regard to sane of the arguments raised by the County, even though the factual situations are somewhat different. In the Pine County case, following the designation of portions of the Kettle River and the adoption of a management plan, the County did not adopt an ordinance as required by the statute. After wait-

ing 18 months, the Commissioner adopted an ordinance for the County as he was permitted to do by law. The County sought to enjoin the operation of the ordinance, and at trial apparently argued that the ordinance was not authorized by the Wild and Scenic Rivers Act because it was more restrictive than the Shoreland Zoning Act and rules. The Supreme Court held that the trial court had "no basis" for accepting such an argument because Minn. Stat. sec. 104.34, subd. 2, specifically permits the promulgation of statewide minimum criteria (and Ordinances) which need not be limited to matters covered by the Shorelands Act. The trial court also found that the Ordinance bore "no demonstrable and reasonable relationship to the legislative objectives" of the Act. The Supreme Court characterized this holding as "unfounded." The Supreme Court stated that the Kettle River Ordinance contained a reasonable set of regulations within the mandate granted to the Department by the Act.

The Supreme Court prepared a table showing the difference between the County's Shorelands Zoning Ordinance and the Comissioner's Ordinance. The table shows, for example, that the land use district under the shorelands ordinance was 300 feet from the river, while the Commissioner's ordinance averaged 1213 feet from the river. The Court stated:

> Although the /shoreland zoning/ act applied to rivers as well as lakes, the protection afforded to rivers was not as extensive. For example, the regulated corridor around lakes extended 1000 feet . . . while it extended only 300 feet back from edges and streams. . . .
>
> In 1973, reaizing that Minnesota's choicest rivers and their surrounding environments were inadequately tected, the legislature . . . enacted the Minnesota Wild and Scenic Rivers Act . . . . (Emphasis added)

By rejecting Pine County's argument that the shorelands restrictions were adequate, and by holding that the Commissioner's ordinance was a constitutionally valid exercise of the State's police power, the Court has affirmed the right of the Commissioner to regulate based on aesthetics.

The Examiner believes that the Court's attitude, expressed in the

Pine County case, buttresses the Department's position in the instant matter.

Based on the foregoing Findings, the Examiner hereby makes the following:

CONCLUSIONS OF LAW

1. that the Department and the Examiner have jurisdiction in this proceeding.

2. That the Department has complied with all relevant, substantive and procedural requirements of law or rule.

3. That the Sherburne County Mississippi and Rum Scenic and Recreational River Ordinance adopted March 20, 1979, is inadequate in that it fails to comply with the standards and criteria of the Commissioner as set forth in the Minimum Criteria (6 MCAR sec. 1.0078-1.0081), the Mississippi

River management Plan (6 MCAR sec. 1.2400-1.2420), and the Rum River Management Plan (6 MCAR 1.2700-2720) as noted in the Findings.

Based on the foregoing, the Examiner makes the following:

RECOMMENDATION

That the Commissioner find that the Ordinance is inadequate.

Dated this 15th day of June, 1979.

ALLAN W. KLEIN
Hearing Examiner

N 0 T I C E

Ibis Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec. 15.0421, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact A. W. Clapp, III, Special Assistant Attorney General, Department of Natural Resources, Centennial Office Building, St. Paul, Minnesota - 55155, phone (612)296-3794 to ascertain the procedure for filing exceptions or presenting argument.